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No. 00-454

IN THE
Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS of the NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, EXECUTIVE DIRECTOR of the NAVAJO TAX COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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INTEREST OF *AMICUS CURIAE*

The Interstate Natural Gas Association of America ("INGAA") respectfully submits this brief in support of the petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.[1]

INGAA is a non-profit national trade association comprised primarily of interstate natural gas pipeline companies regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act ("NGA").[2] Member companies operate approximately 200,000 miles of natural gas pipelines, together with related facilities, within the United States, and INGAA's members account for more than 90% of all natural gas transported and sold in interstate commerce within the United States.

There are approximately 55 million acres of Indian land located within the United States. As a consequence of the location of this land, a number of pipeline companies which belong to INGAA have portions of their pipelines, and certain related pipeline facilities, located within the exterior boundaries of Indian reservations. To cross lands held in trust by the United States for Indian tribes or individual Indians, the members of *amicus* INGAA are required to obtain rights-of-way granted by the United States, most often under the authority of the General Right-of-Way Act of 1948. 25 U.S.C. § 323 et seq.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* INGAA states that no counsel for any party to this dispute authored this brief, in whole or in part, and no entity other than *amicus curiae* INGAA and its member companies, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and copies of these consents have been filed with the Office of the Clerk of this Court.

[2] 15 U.S.C. § 717 et seq.

Tribal governments often assert that they have jurisdictional authority over the on-Reservation portion of these pipelines, without regard to whether the pipeline is located on non-Indian owned fee land, or on Indian trust land. One area of jurisdictional authority of particular interest to INGAA and its members is the asserted power of Indian tribes to levy and collect taxes related to those pipelines and pipeline facilities located within the exterior boundaries of Indian reservations. As captive taxpayers who are unable to easily relocate their natural gas pipelines, the level and extent of tribal taxation has an impact upon the economic well being of those pipelines subject to tribal taxing efforts. Thus, any decision which appears to expand the scope of a tribe's taxing authority, particularly one that allows a tribe to tax a non-Indian for business conducted on non-Indian owned fee land within a reservation, is of critical importance to INGAA.

Amicus INGAA has a substantial interest in supporting the petition for certiorari for a number of reasons. INGAA, as a national trade association, has a strong interest in ensuring that its member companies are subject to taxation only where the taxing entity possesses the proper jurisdictional authority and power to impose a tax. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court held that rights-of-way granted to non-Indian parties pursuant to the General Right-of-Way Act of 1948 vested in the right-of-way recipient interests which were the equivalent, for purposes of determining tribal jurisdiction over such interests, to fee title. *Amicus* INGAA believes, based on precedent from this Court, that Indian tribes lack, except in special limited circumstances, the jurisdictional authority to tax a non-Indian party in connection with business activity taking place on fee land and not significantly involving a tribe or its members. *Montana v. United States*, 450 U.S. 544 (1981).

The Tenth Circuit's holding that the Navajo Tribe could impose a tax on non-Indian guests staying at a hotel on non-

Indian land, and the jurisdictional inquiry which it conducted in reaching such a holding, failed to consider the important jurisdictional limitations which apply to tribal action involving fee lands, and is inconsistent with the precedent of this Court and with a recent Ninth Circuit Court of Appeals decision. *Big Horn Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). This decision of the Tenth Circuit is particularly troubling to pipeline companies, since they are often the most visible, and vulnerable target for tribal taxing ordinances.

Amicus INGAA is also interested in supporting the petition for certiorari in order to obtain clarity for its members, and indeed for all non-Indian parties who conduct business on fee property or its equivalent located within an Indian reservation, that the taxing jurisdiction of Indian tribes is synonymous with and not superior to the other jurisdictional powers of a tribe. The Ninth Circuit Court of Appeals, in *Big Horn*, carefully and correctly applied the precedent of this Court gathered from a number of cases which have focused on a tribe's jurisdictional authority over non-Indians, and reached the conclusion that an Indian tribe lacks jurisdiction to impose a property tax on the property interests of a utility located within a federally granted right-of-way across tribal and allotted lands. The decision of the Tenth Circuit is inconsistent with the Ninth Circuit's decision in *Big Horn*, and that inconsistency appears to be reflective of an incorrect jurisdictional analysis undertaken by the Tenth Circuit.

Amicus INGAA's members have pipelines located in both the Ninth and Tenth Circuits, as well as in circuits which have not yet considered, in light of this Court's opinion in *Strate*, the jurisdictional authority of an Indian tribe to tax a non-Indian party doing business on fee property or its equivalent within the boundaries of an Indian reservation. It is of great importance to INGAA's members that all federal courts properly apply the jurisdictional guidelines of this Court's

holdings in *Montana*, *Merrion v. Jicarilla Apache* Tribe, 455 U.S. 130 (1982), and *Strate* to insure consistency in the extent and nature of tribal jurisdiction to which each non-Indian party is properly subject.

SUMMARY OF ARGUMENT

The precedent of this Court firmly evidences that any governmental entity seeking to impose a tax must have jurisdiction over the entity or activity being taxed before the tax is valid and enforceable. The precedent of this Court over the last 20 years has also served to clarify, and set within more narrow and precise boundaries, the extent to which an Indian tribe may assert jurisdiction over a non-Indian party doing business upon on-reservation, non-Indian owned fee land, or its equivalent. The Tenth Circuit's decision employs a sliding scale balancing test for determining the scope of an Indian tribe's taxing authority over non-Indians (and/or their property or activity) who are engaged in activity on fee lands. This test is inconsistent with the guiding precedent of this Court. The Tenth Circuit's balancing test seemingly will allow tribes to tax non-Indian parties under an inquiry that gives little consideration to the principles that have been at the center of this Court's Indian jurisdiction cases, while at the same time considering, for purposes of jurisdiction, the asserted needs and/or uses to be made of tribal tax revenue as if a tribe could obtain or earn the jurisdictional authority for a tax by the appropriate utilization of the tax revenue received. The failure to adequately consider the threshold issue of whether a tribe has the requisite jurisdiction to tax in light of this Court's clear and overriding rules concerning the scope of tribal jurisdiction over non-Indians in factual settings like that considered by the Tenth Circuit warrants review by this Court.

ARGUMENT

I. THIS COURT SHOULD REVIEW THIS CASE BECAUSE THE TENTH CIRCUIT FAILED TO CONDUCT A PROPER INQUIRY INTO WHETHER THE NAVAJO NATION HAD JURISDICTION TO IMPOSE ITS TAX

A. The Power of Taxation Cannot Be Validly Exercised Over Persons or Property Located Outside The Jurisdiction of The Taxing Authority

INGAA recognizes that the right of a tribe to tax is an essential element of its sovereignty. This power provides a mechanism for funding essential governmental services while also serving as a tool for territorial management. *See Merrion v. Jicarilla Apache Tribe*, 455, U.S. 130, 137 (1982). However, this power, like all sovereign powers, is limited in scope, and extends only to those over whom the taxing sovereign can properly exercise jurisdiction.

The power of a sovereign to tax was considered nearly two centuries ago by this Court in *M'Culloch v. State of Maryland*, 17 U.S. (4 *Wheat*) 316, 429 (1819), wherein Chief Justice Marshall noted:

> It is obvious, that it (the power to tax) is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

Similar pronouncements have been repeated as this Court has faced issues relating to the taxing jurisdiction of various governmental entities. *See*, *Louisville & Jeffersonville Ferry Company v. Commonwealth of Kentucky*, 18 U.S. 385, 396,

23 S.Ct. 463, 467 (1903) ("While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

This point was well made in *St. Louis v. The Ferry Company*, 78 U.S. (11 Wall) 423, 430 (1870), wherein this Court stated:

> Where there is jurisdiction neither as to the person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to a valid legislative as a valid judicial action.

A review of three key decisions of this Court on the issue of tribal jurisdiction over non-Indians clearly shows that the Tenth Circuit decision allowing the imposition of the Navajo Nation's Hotel Occupancy Tax on non-Indian parties utilizing a hotel on non-Indian land within the Navajo Indian Reservation failed to properly consider the fundamental question of jurisdiction utilizing the principles which this Court has laid down. When properly considered, it is clear that while the power to tax is one of many sovereign powers, the power to tax can no more stand alone than can the power to zone or the power to assert civil adjudicatory jurisdiction. Here, precedent of this Court has established that the general jurisdiction of a tribe does not extend to non-Indian parties who are engaged in business activities on fee lands within a reservation, and thus the power to tax, which is co-extensive

with, but not superior to the other jurisdictional powers of a tribe, is also lacking.

B. The Powers of Tribal Self Government Do Not Include the Jurisdiction to Impose Taxes On Non-Indian Parties Who Are Engaged in Business Activities On Non-Indian Owned Fee Land

Both the nature and the extent of tribal sovereignty have been addressed numerous times in the last two decades by this Court and other courts. From those decisions, a number of principles have developed which lead to the conclusion that the Tenth Circuit's decision improperly deviates from this Court's precedent and should thus be reviewed by this Court. A review of three of these decisions well evidences the propriety of granting the petition for a writ of certiorari.

This Court, in 1981, issued the seminal case of *Montana v. United States*, 450 U.S. 544, which undertook an extensive review of tribal civil jurisdiction over non-Indians, with particular emphasis on tribal attempts to regulate the activity of non-Indians occurring on fee lands. In *Montana*, this Court determined that the Crow Tribe could not regulate hunting and fishing by nonmembers of the Tribe where the activity occurred on fee lands within the reservation. In reaching its decision, this Court concluded that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Continuing, this Court observed that since "regulation of hunting and fishing by nonmembers of a tribe on land no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty" did not authorize the Tribe's activity. 450 U.S. at 564, 565. Rather, this Court concluded that, in general, the "inherent sovereign powers of an Indian

tribe do not extend to nonmembers of the Tribe." 450 U.S. at 565. This same analytical framework, and this same conclusion regarding tribal jurisdiction should have been reached here had the Tenth Circuit undertaken the proper inquiry into the jurisdictional power of the Navajo tribe to tax the activities of non-Indians occurring on non-Indian fee land. The taxation of activity occurring on fee land also bears no clear relationship to tribal self government or internal tribal relations.

In *Montana*, this Court did recognize that tribes may, in certain instances, exercise tribal civil jurisdiction over non-Indians, even where Congress has not expressly authorized such exercise and no specific treaty otherwise guarantees such jurisdiction. These circumstances were narrowly described as follows:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. 450 at 565-566 (citations and footnote omitted).

There is here no consensual relationship of the qualifying kind. See *Petition of Atkinson Trading Company Inc.*, at pages 15 through 18. Similarly, the Tribe's desire to tax has no relation to the Tribe's political integrity, economic security, or health and welfare.

The second case of great relevance is *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, this Court upheld the Jicarilla Apache Tribe's right to enforce a severance tax against non-Indian oil companies on any "oil and natural gas severed, saved and removed from *Tribal* lands . . . ." 455 U.S. at 133 (emphasis added). In so doing, this Court determined that the taxing power of a tribe could extend to non-Indians, but only if the non-Indian party was "engaged in economic activities within that [the Tribe's] jurisdiction." 455 U.S. at 137. In *Merrion*, the oil company lessees were determined to be within the scope of the Tribe's jurisdiction based on their contractual relationship with the Tribe and their having conducted business on tribal lands. In this Court's words:

> . . . a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power. A tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the Tribe. 455 U.S. at 141, 142.

Thus, in the leading case on tribal taxing authority, it is clear that an initial finding of tribal jurisdiction over the non-Indian party must be made in order for the taxing authority of the Tribe to be exercised. Where the activity to be taxed involves activities occurring on fee land, then *Montana's* jurisdictional analysis applies, as does *Montana's* inherent

presumption against tribal jurisdiction.[3] Here, simply by using state highways and staying at a non-Indian owned hotel located on non-Indian owned fee land, the non-Indian guests did not undertake any actions which would bring them within the Tribe's jurisdiction.

The third decision of direct consequence to this petition is the unanimous opinion of this Court in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Strate* again adopts the *Montana* analysis for considering the scope of tribal jurisdiction over non-Indians. In addressing the issue of the adjudicatory jurisdiction of tribes over non-Indians on non-Indian fee land or its equivalent, this Court amplified on the broad application of *Montana*, stating:

> Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "does not extend to the activities of nonmembers of the tribe." 520 U.S. at 453 (internal citations to *Montana v. United States* omitted).

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[3] In this regard, this Court's decision in *South Dakota v. Bourland*, 508 U.S. 679 (1993) is instructive, inasmuch as *Bourland* forcefully notes that "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' (citing *Montana*) 450 U.S. at 564, and is therefore *not* inherent." 508 U.S. at 695, n. 15 (emphasis in original).

Since the power to tax is a "legislative power" and part of a tribe's "civil authority," the specific reference in the above quote to these broad terms undercuts any suggestion that the general jurisdictional limitations inherent in *Montana* do not extend to the full panoply of a tribe's sovereign powers, including the power to tax. Quite clearly, a tribe's taxing authority is merely one of the legislative powers which comprises a tribe's civil authority, and therefore one of the powers limited by *Montana* and *Strate*.

Here, the sliding scale balancing test adopted by the Tenth Circuit to determine whether a tribe should be allowed to tax a non-Indian party simply begs the question of whether there exists tribal jurisdiction to support such a right in the first instance. To conclude that a tribe can impose a tax based, even in part, upon the benefits to be obtained from the revenue generated by the tax, brings into the jurisdictional inquiry matters which have no bearing on jurisdiction, and suggests that jurisdiction can be earned by the taxing entity provided that entity makes proper use of the tax revenues which it receives. Under the analytical framework set forth by this Court, it is clear that the Tenth Circuit's analysis was flawed and failed to examine the jurisdictional reach of the Tribe's taxing power in light of the clear limitations which this Court has provided.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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